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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 DEREK J. BLOODWORTH,
12 CDCR# F-53229,

13 Plaintiff,

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15 vs.
16

17 W. HART, et al.,
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20 Defendants.
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Civil No. 10-0128 DMS (AJB)

ORDER:

(1) **GRANTING PLAINTIFF'S
MOTION TO PROCEED *IN*
FORMA PAUPERIS, IMPOSING
INITIAL PARTIAL FILING FEE
AND GARNISHING BALANCE
FROM PRISONER'S TRUST
ACCOUNT PURSUANT
TO 28 U.S.C. § 1915(a)
[Doc. No. 2]; and**

(2) **DISMISSING CIVIL ACTION
FOR FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C.
§§ 1915(e)(2)(B) & 1915A(b)**

23 Plaintiff, a state inmate currently incarcerated at the Richard J. Donovan Correctional
24 Facility located in San Diego, California, and proceeding pro se, has filed a civil rights
25 Complaint pursuant to 42 U.S.C. § 1983. In addition, Plaintiff has filed a Motion to Proceed *In*
26 *Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2].

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1 **I. MOTION TO PROCEED IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the United
3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
4 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee
5 only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
6 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP
7 remains obligated to pay the entire fee in installments, regardless of whether his action is
8 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
9 (9th Cir. 2002).

10 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a
11 prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account
12 statement (or institutional equivalent) for the prisoner for the six-month period immediately
13 preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,
14 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial
15 payment of 20% of (a) the average monthly deposits in the account for the past six months, or
16 (b) the average monthly balance in the account for the past six months, whichever is greater,
17 unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
18 institution having custody of the prisoner must collect subsequent payments, assessed at 20%
19 of the preceding month's income, in any month in which the prisoner's account exceeds \$10, and
20 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
21 § 1915(b)(2).

22 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
23 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119.
24 Plaintiff's statement shows a current available balance of \$21.85, an average monthly balance
25 of \$40.00, and average monthly deposits totaling \$30.00. Based on this financial information,
26 the Court GRANTS Plaintiff's Motion to Proceed IFP [Doc. No. 2] and assesses an initial partial
27 filing fee of \$8.00 pursuant to 28 U.S.C. § 1915(b)(1).

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1 However, the Secretary for the California Department of Corrections and Rehabilitation
 2 or his designee, shall collect this initial fee *only if sufficient funds in Plaintiff's account are*
 3 *available at the time this Order is executed* pursuant to the directions set forth below. *See* 28
 4 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing
 5 a civil action or appealing a civil action or criminal judgment for the reason that the prisoner has
 6 no assets and no means by which to pay the initial partial filing fee.”); *Taylor v. Delatoore*, 281
 7 F.3d 844, 850 (9th Cir. 2002) (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve”
 8 preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack
 9 of funds available to him when payment is ordered.”). The remaining balance shall be collected
 10 and forwarded to the Clerk of the Court pursuant to the installment payment provisions set forth
 11 in 28 U.S.C. § 1915(b)(1).

12 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

13 The PLRA’s amendments to 28 U.S.C. § 1915 also obligate the Court to review
 14 complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated
 15 or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for,
 16 violations of criminal law or the terms or conditions of parole, probation, pretrial release, or
 17 diversionary program,” “as soon as practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2)(B)
 18 and 1915A(b). Under these provisions, the Court must sua sponte dismiss any prisoner civil
 19 action and all other IFP complaints, or any portions thereof, which are frivolous, malicious, fail
 20 to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C.
 21 §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
 22 (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir. 2000) (§ 1915A).

23 **A. 42 U.S.C. § 1983**

24 To state a claim under § 1983, Plaintiff must allege that: (1) the conduct he complains
 25 of was committed by a person acting under color of state law; and (2) that conduct violated a
 26 right secured by the Constitution and laws of the United States. *Humphries v. County of Los*
 27 *Angeles*, 554 F.3d 1170, 1184 (9th Cir. 2009) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)).

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1 Plaintiff claims that on September 15, 2009 he was temporarily housed at the Imperial
2 County Jail. (*See* Compl. at 4.) Plaintiff was escorted to the Imperial County Jail by
3 correctional officers with the California Department of Corrections and Rehabilitation
4 (“CDCR”) because he was facing criminal charges related to his incarceration at Centinela State
5 Prison. (*Id.*) Plaintiff was appointed advisory counsel to assist him with the preparation of his
6 defense in the criminal matter. (*Id.*)

7 Plaintiff claims that during a recess in the court proceedings, he was placed in the holding
8 cell so that he could have a confidential meeting with his advisory counsel. (*Id.* at 5.) During
9 this conference, Plaintiff alleges that Defendant Rodriquez could hear the privileged
10 conversation between himself and Attorney Aulis which forced him to “abort his confidential
11 conference with Attorney Aulis.” (*Id.* at 6.)

12 **B. First Amendment claims**

13 “[A] prison inmate retains those First Amendment rights that are not inconsistent with his
14 [or her] status as a prisoner or with the legitimate penological objectives of the corrections
15 system.” *Pell v. Procunier*, 417 U.S. 817, 822 (1974). “Prisoners have a First Amendment right
16 to telephone access, subject to reasonable security limitations.” *Keenan v. Hall*, 83 F.3d 1083,
17 1092 (9th Cir. 1996). However, a prison regulation that impinges on an inmate’s constitutional
18 right “is valid if it is reasonably related to legitimate penological interests.” *Turner v. Safely*,
19 482 U.S. 78, 89 (1987). Moreover, the Court must consider whether “there are alternative means
20 of exercising the right that remain open to prison inmates.” *Id.* at 90.

21 Here, while Plaintiff objects to the presence of a correctional officer while attempting to
22 speak with his advisory counsel, he fails to allege the lack of a legitimate penological interest.
23 Moreover, he fails to allege any fact regarding a lack of alternative means by which he could
24 have communicated with his counsel. Thus, Plaintiff’s First Amendment claims are dismissed
25 for failing to state a claim upon which relief may be granted.

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1 **C. Fifth Amendment claims**

2 Plaintiff claims that Defendant Rodriquez’ “eavesdropping on plaintiff’s attorney/client
3 conference had an effect of compelling plaintiff to be a witness against himself in violation of
4 the Fifth Amendment.” (Compl. at 8.) The Fifth Amendment to the United States Constitution
5 provides in part that “no person . . . shall be compelled in any criminal case to be a witness
6 against himself.” U.S. CONST. amend. V. Plaintiff alleges no facts that would support a Fifth
7 Amendment claim. While Plaintiff claims that the eavesdropping occurred during a recess of
8 his criminal proceeding, he does not allege that he was in any “real or appreciable danger of self-
9 incrimination.” *McCoy v. Comm’r*, 696 F.2d 1234, 1236 (9th Cir. 1983). “If the threat is remote,
10 unlikely, or speculative, the privilege does not apply.” *Id.*

11 Here, Plaintiff fails to state sufficient factual allegations as to how any statements he
12 made in the presence of Defendants would be used against him. Accordingly, Plaintiff’s Fifth
13 Amendment claims are dismissed for failing to state a claim.

14 **D. Sixth Amendment**

15 Plaintiff further alleges that Defendant Rodriquez’ “eavesdropping on plaintiff’s
16 confidential communications with Attorney Aulis was an improper governmental intrusion and
17 interference with plaintiff’s attorney/client relationship with counsel.” (Compl. at 9.) However,
18 mere allegations of government intrusion of the attorney client privilege “is not sufficient by
19 itself to cause a Sixth Amendment violation.” *U.S. v. Hernandez*, 937 F.2d 1490, 1493 (9th Cir.
20 1991). Rather the Plaintiff must allege and later demonstrate that he was actually prejudiced by
21 these actions which Plaintiff fails to do. *Id.* Accordingly, Plaintiff’s Sixth Amendment claims
22 are dismissed for failing to state a claim.

23 **E. Retaliation claims**

24 Plaintiff also alleges that Defendants retaliated against him after he requested that
25 “Defendant J. Rodriguez cease eavesdropping on plaintiff’s confidential community with
26 Attorney Aulis.” (Compl. at 11.) *See Rhodes v. Robinson*, 408 F.3d 559, 568 (9th Cir. 2005)
27 In order to prevail on a claim of retaliation, Plaintiff must be able to prove the following five
28 factors: “(1) An assertion that a state actor took some adverse action against [Plaintiff]; (2)

1 because of (3) [Plaintiff's] protected conduct, and that such action (4) chilled [Plaintiff's]
 2 exercise of his First Amendment rights, and (5) the action did not reasonably advance a
 3 legitimate correctional goal.” See *Rhodes v. Robinson*, 408 F.3d 559, 567-568 (9th Cir. 2005)
 4 (citing *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000); *Barnett v. Centoni*, 31 F.3d 813,
 5 815-16 (9th Cir. 1994) (per curiam)). Plaintiff has alleged no facts to suggest that the actions
 6 of Defendants did not reasonably advance a legitimate correctional goal. Accordingly,
 7 Plaintiff's First Amendment retaliation claims are dismissed for failing to state a claim upon
 8 which § 1983 relief can be granted.

9 F. State Law Claims

10 Plaintiff also brings a number of state law claims in this action. However, because
 11 Plaintiff cannot identify a violation of a federal law, the Court exercises its discretion to dismiss
 12 Plaintiff's pendent state law claims without prejudice. See 28 U.S.C. § 1367(c)(3) (“The district
 13 court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if ...
 14 the district court has dismissed all claims over which it has original jurisdiction.”); *United Mine*
 15 *Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) (“if the federal claims are dismissed
 16 before trial, ... the state claims should be dismissed as well.”); *Acri v. Varian Assoc., Inc.*, 114
 17 F.3d 999, 1000 (9th Cir. 1997) (“[O]nce judicial power exists under § 1367(a), retention of
 18 supplemental jurisdiction over state law claims under 1367(c) is discretionary.”).

19 Accordingly, the Court must DISMISS Plaintiff's Complaint for all the reasons set forth
 20 above but will provide Plaintiff with the opportunity to amend his Complaint to correct the
 21 deficiencies of pleading identified by the Court.

22 III. CONCLUSION AND ORDER

23 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

24 1. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]
 25 is **GRANTED**.

26 2. The Secretary of the California Department of Corrections and Rehabilitation, or
 27 his designee, is ordered to collect the \$8.00 initial partial filing fee assessed by this Order and
 28 forward that amount to the Clerk of Court, *if those funds are available at the time this Order*

1 *is executed.* THE INITIAL PARTIAL FILING FEE SHALL BE CLEARLY IDENTIFIED BY
2 THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

3 3. The Secretary of the California Department of Corrections and Rehabilitation, or
4 his designee, is ordered to collect from Plaintiff's prison trust account the balance of the \$350
5 filing fee owed in this case by collecting monthly payments from Plaintiff's prison trust account
6 in an amount equal to twenty percent (20%) of the preceding month's income credited to the
7 account and forward payments to the Clerk of the Court each time the amount in the account
8 exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL MONTHLY PAYMENTS
9 SHALL BE CLEARLY IDENTIFIED BY THAT NAME AND NUMBER ASSIGNED TO
10 THIS ACTION.

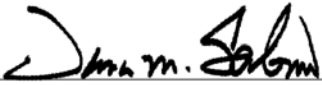
11 4. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
12 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
13 Sacramento, California 95814.

14 **IT IS FURTHER ORDERED** that:

15 5. Plaintiff's Complaint is **DISMISSED** without prejudice for failing to state a claim
16 upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b).
17 However, Plaintiff is further **GRANTED** forty five (45) days leave from the date this Order is
18 filed in which to file a First Amended Complaint which cures all the deficiencies of pleading
19 noted above. Plaintiff's Amended Complaint must be complete in itself without reference to
20 his previous pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not named and all claims not re-
21 alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565,
22 567 (9th Cir. 1987).

23 **IT IS SO ORDERED.**

24
25 DATED: February 3, 2010

26 
27 HON. DANA M. SABRAW
28 United States District Judge